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No. 92-432

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In the Supreme Court of the United States

OCTOBER TERM, 1992

DICK GIFFORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 28 U.S.C. 2680(c), which exempts the government from liability under the Federal Tort Claims Act for "[a]ny claim arising in respect of * * * the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer," applies only to detentions by officers performing customs or tax functions, or to detentions by other law-enforcement officers as well.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is unpublished, but the judgment is noted at 967 F.2d 586 (Table). The decision and order of the district court (Pet. App. A3-A9) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1992. The petition for a writ of certiorari was filed on September 8, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Dick Gifford acquired a number of horses through a program administered by the Bu-

reau of Land Management (BLM), Department of the Interior, under the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. 1331 *et seq.* During 1986, petitioner was the subject of two criminal investigations conducted by the BLM for alleged violations of that Act, one concerning the use of untitled horses in rodeos and the other concerning the sale of untitled horses. BLM law-enforcement officials detained petitioner's horses during the course of the investigations. Pet. App. A8; Pet. 5. Petitioner claimed that several of the horses were injured during those detentions. Pet. App. A10-A13.

2. Petitioner initially filed an administrative claim. The BLM denied the claim, finding that the detention had been performed by law-enforcement agents, and was therefore barred by Section 2680(c).[1] Pet. App. A12. Petitioner then filed an action in the United States District Court for the District of Montana against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, seeking damages for the alleged injuries to his horses. The United States moved to dismiss the action for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). Pet. App. A3, A5.

The District Court granted the United States' motion, finding that the detention of the horses by BLM agents came within the Section 2680(c) exemption for "[a]ny claim arising in respect of * * * the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer." Pet. App. A5-A9.

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[1] The claim was also denied because petitioner had not shown that the horses were injured during their detention by the government and had not offered any credible evidence of his alleged losses. Pet. App. A11-A12.

The court rejected petitioner's argument that the exemption should be read to cover only detention of goods by law-enforcement officers engaged in customs or tax activities. Pet. App. A7-A8. The court acknowledged that some courts have questioned whether the statute covers law-enforcement agents acting outside the customs and excise contexts, but held that the plain language of the provision covers all law-enforcement officers. *Ibid.*

3. The United States Court of Appeals for the Ninth Circuit affirmed in an unpublished opinion, Pet. App. A1-A2, relying on its previous ruling in *United States* v. *Lockheed L-188 Aircraft*, 656 F.2d 390 (9th Cir. 1979), that "[28 U.S.C.] 2680(c) . . . does not apply solely to loss from detention of goods by tax or customs officers, but includes actions by 'any other law enforcement officer.'" *Id.* at 397 (quoting 28 U.S.C. 2680(c)).

ARGUMENT

The decision of the court of appeals is correct in all respects, and does not conflict with any decision of this Court or any other court. Further review is therefore unwarranted.

The Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, exempts the United States from liability for

> [a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

28 U.S.C. 2680(c). Petitioner does not dispute the district court's conclusion that his horses were de-

tained by BLM law-enforcement officers. Pet. 5, 7. Petitioner's claim is accordingly one "arising in respect of" a "detention" by a "law-enforcement officer" that falls squarely within the Section 2680(c) exemption.

Petitioner's sole attempt to avoid the plain language of the statute is his claim that "any other law-enforcement officer" should be construed to mean only law-enforcement officers performing customs or tax work. He argues that dictum in *Kosak* v. *United States*, 465 U.S. 848 (1984), suggests that the scope of the exemption is open to question:

> We have no occasion in this case to decide what kinds of "law-enforcement officer[s]," other than customs officials, are covered by the exception.

Id. at 852 n.6. In addition, petitioner points to two concurring opinions in the courts of appeals which have suggested that such a narrow reading is appropriate. *Formula One Motors, Ltd.* v. *United States*, 777 F.2d 822, 825 (2d Cir. 1985) (Oakes, J., concurring); *A-Mark, Inc.* v. *United States Secret Service*, 593 F.2d 849, 850-851 (9th Cir. 1978) (Tang, J., concurring).

However, every court discussing the interpretation directly has concluded that the exemption should be read literally as covering *all* law-enforcement agents,[2] *Schlaebitz* v. *United States Dep't of Justice*, 924 F.2d 193, 194-195 (11th Cir. 1991) (U.S. Marshals); *Ysasi* v. *Rivkind*, 856 F.2d 1520, 1524-1525 (Fed.

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[2] Two courts have addressed the question, but found it unnecessary to resolve. *Paul* v. *United States*, 929 F.2d 1202, 1204 (7th Cir. 1991); *Formula One Motors, Ltd.* v. *United States*, 777 F.2d 822, 823-824 (2d Cir. 1985).

Cir. 1988) (Border Patrol agents); *United States* v. *Lockheed L-188 Aircraft*, 656 F.2d 390, 397 (9th Cir. 1979) (Federal Aviation Administration officials); *Sterling* v. *United States*, 749 F. Supp. 1202, 1213 (E.D.N.Y. 1990) (Drug Enforcement Administration agents); *Milburn* v. *United States*, 647 F. Supp. 1521, 1524-1525 (S.D. Fla. 1986) (Federal Bureau of Investigation (FBI) agents and U.S. Marshals); *Van Buskirk* v. *United States*, 206 F. Supp. 553, 556 (E.D. Tenn. 1962) (FBI agents), and other courts have applied the exception without discussion when detentions were conducted by officers outside the customs and excise context, *United States* v. *$149,345 United States Currency*, 747 F.2d 1278, 1283 (9th Cir. 1984) (federal narcotics agents); *United States* v. *2,116 Boxes of Boned Beef*, 726 F.2d 1481, 1491 (10th Cir. 1984) (Department of Agriculture agents); *A-Mark, Inc.* v. *United States Secret Service*, 593 F.2d 849, 850 (9th Cir. 1978) (U.S. Secret Service agents); *United States* v. *1500 Cases*, 249 F.2d 382, 384 (7th Cir. 1957) (Food and Drug Administration officials); *Jones* v. *FBI*, 139 F. Supp. 38, 42 (D. Md. 1956) (FBI agents).

There is accordingly no conflict among the courts. Moreover, these decisions are correct. The literal interpretation of "any other law-enforcement officer" is consistent with the intent of Congress to "protect the Government from liability that would seriously handicap efficient government operations," *United States* v. *Muniz*, 374 U.S. 150, 163 (1963), and accords with the legislative purpose of the exemption. See *Molzof* v. *United States*, 112 S. Ct. 711, 718 (1992) ("The § 2680 exceptions are designed to protect certain important governmental functions and

prerogatives from disruption."). Review by this court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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